U.S. Department of Labor

Board of Alien Labor Certification Appeals
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NOTICE: This is an electronic bench opinion which has not been verified as official.

Date Issued: 10/29/99
Case No.: 1999 INA 0198

In the Matter of:

STONE CRAFT PROPERTY MANAGEMENT, INC., Employer,

on behalf of

CARLOS FLORES, Alien.

Appearance: J. P. Karnos, Esq., of Santa Ana, California, for the Employer and Alien.
Certifying Officer: R. M. Day, Region IX.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of CARLOS FLORES ("Alien") by STONE CRAFT PROPERTY MANAGEMENT, INC., ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On May 16, 1995, the Employer applied for alien labor certification on behalf of the Alien to fill the position of "Plumber" in its Real Estate Management business. AF 19. The position was classified as "Plumber, Maintenance," under DOT No. 862.381-030.[3] The duties of the Job to be Performed were the following:

> The occupant will be required to install, assemble, maintain, and repair pipings, fixtures, appliances and appurtenances in connection with water supply, drainage systems and related hydraulic and pneumatic equipment for steam, hot water, heating, cooling, lubricating, sprinkling and industrial production and processing systems. Occupant of said position, must cut pipe, related metals and, non-metals, by using saws, pipe cutters, hammer and chisel, cutting torch, as well as laser cutting equipment. He must have knowledge of bending, threading and securing pipes to structures with brackets, clamps, and hangers, using hand tools and power tools.

AF 19, box 13. (Copied verbatim without change or correction.) The Other Special

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

[3]862.381-030 **PLUMBER, CONSTRUCTION** Assembles, installs, and repairs pipes, fittings, and fixtures of heating, water, and drainage systems, according to specifications and plumbing codes: Studies building plans and working drawing to determine work aids required and sequence of installations. Inspects structure to ascertain obstructions to be avoided to prevent weakening of structure resulting from installation of pipe. Locates and marks position of pipe and pipe connections and passage holes for pipes in walls and floors, using ruler, spirit level, and plumb bob. Cuts openings in walls and floors to accommmodate pipe and pipe fittings, using handtools and power tools. Cuts and threads pipe, using pipe cutters, cutting torch, and pipe-threading machine. Bends pipe to required angle by use of pipe-bending machine or by placing pipe over block and bending it by hand. Assembles and installs valves, pipe fittings, and pipes composed of metals, such as iron, steel, brass, and lead, and nonmetals, such as glass, vitrified clay, and plastic, using handtools and power tools. Joins pipes by use of screws, bolts, fittings, solder, plastic solvent, and caulks joints. Fills pipe system with water or air and reads pressure gauges to determine whether system is leaking. Installs and repairs plumbing fixtures, such as sinks, commodes, bathtubs, water heaters, hot water tanks, garbage disposal units, dishwashers, and water softeners. Repairs and maintains plumbing by replacing washers in leaky faucets, mending burst pipes, and opening clogged drains. May weld holding fixtures to steel structural members. When specializing in maintenance and repair of heating, water, and drainage systems in industrial or commercial establishments, is designated Plumber, Maintenance (any industry). *GOE: 05.05.03 STRENGTH: H GED: R4 M3 L3 SVP: 7 DLU: 77.*

Requirements was, "Resume required." *Id.*, box 15.[4] The education and experience that the Employer required consisted of grade school graduation plus two years of experience in the Job Offered. The work week consisted of forty hours per week of regular time from 8:00 a.m., to 5:00 p.m., on days that were not specified, with no provision for overtime. The wage rate offered was $13.75 per hour. *Id.*, boxes 10-12, 14-15. Although thirteen apparently qualified U. S. workers applied for this job opportunity, the Employer did not hire any of these applicants for the Job Offered. AF 21-27, 34, 37, 40, 52-58, 64-76, 78.

Notice of Findings. On March 17, 1998, the Notice of Findings ("NOF") denied certification, subject to Employer's rebuttal. AF 12-17. Two material deficiencies were found: (1) The Employer failed to offer a wage that equalled or exceeded the prevailing wage for a - Plumber, and (2) the Employer failed to offer lawful, job-related reasons for the rejections of five apparently qualified U. S. workers who applied for the job: Casillas, De Jesus, Smith, Soto, and Walker. The NOF cited 20 CFR §§ 656.40(a)(1), 656.21(b)(6), 656.21(j)(1)(iii), and 656.21(j)(1)(iv) as regulatory authority for these findings. First, the NOF said, the prevailing wage for the occupation of plumber was $31.31 per hour, as determined under the Davis-Bacon Act, which was materially higher than the hourly rate Employer had offered in its application. The NOF explained that the regulations require the Employer to show that the job duties are not those of an occupation for which a Davis-Bacon Act determination has been made, adding that a statement that the Employer did not have a construction contract with the federal government was not acceptable evidence that the occupation was not covered by the Davis-Bacon Act. The Employer was given the option to increase the wage it offered to the level of the prevailing wage and retest the market. By way of an alternative the Employer was advised that it could contest the wage finding by showing that a Davis-Bacon Act wage determination had not been made for this occupation. Second, the NOF discussed the evidence as to the Employer's response to the referral of the five U. S. workers who applied for the job: Casillas, De Jesus, Smith, Soto, and Walker. The Employer's recruitment report, the questionnaire response, and the other evidence of record as to each of them was explicitly discussed in the NOF. By way of corrective action, the Employer was directed to furnish specific reasons that are lawful and job-related for its rejection of each of the U. S. workers named. AF 15-16.

Rebuttal. On May 29, 1998, the Employer filed its rebuttal, which consisted of a letter from its attorney, which the Employer's president countersigned to indicate his agreement and concurrence. The Employer attached page 55 of a document apparently captioned, "1995 Wage Supplement," which indicated that its source was the labor market information division's occupational research unit of the state employment security agency ("state agency") labor. The page included data referring to plumbers, pipefitters, and steamfitters in Los Angeles County for 1994. AF 03. Based on the Employer's interpretation of 20 CFR § 656.50(a)(1) the Employer

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[4]The Alien was born 1966. He was a national of Mexico, and was living and working in the United States without the permission of a visa of any kind. The Alien completed elementary school in Mexico in 1979. From 1983 to 1986 he worked as plumber in Mexico. From 1991 to the date of application he worked for the Employer as a plumber in the Job Offered. AF 95-96.

cited the holdings of U. S. District Court decisions in Ohio, Virginia, and the District of Columbia jurisdictions that the Davis-Bacon prevailing wage determination did not apply. In addition, the Employer argued that the median wage for a plumber in AF 03 was the correct prevailing wage. The Employer then reiterated its recruitment report assertions as to Casillas, De Jesus, Smith, Soto, and Walker, and it contradicted the statements each of them made in their questionnaire responses.

Final Determination. In denying certification in the October 29, 1998, Final Determination, the CO addressed only the findings concerning the prevailing wage and did not preserve as an issue the findings based on the Employer's rejection of apparently qualified U. S. workers. The CO rejected the Employer's rebuttal based on the contention that the Job Offered was subject to the Davis-Bacon Act. Regardless of whether there was a contract with the Federal Government, due to the nature of the position itself, the Job Offered was subject to the Davis-Bacon Act, the Final Determination explained. The CO added that the data provided in the state agency's publication did not supersede the wage rate established under the Davis-Bacon Act for this position, and that the prevailing wage for the position was the Davis-Bacon Act hourly rate of $31.31. As the Employer had offered a position that was subject to the Davis-Bacon Act and the Employer failed to offer the prevailing hourly wage of $31.31 that the Davis-Bacon Act required, the CO denied Employer's application for alien labor certification.

Appeal. On November 5, 1998, the Employer filed its request for administrative judicial review by BALCA on grounds that (a) that the correct prevailing wage was $13.75 per hour, and (b) that the occupation of plumber was not within the Davis-Bacon Act. AF 01.

DISCUSSION

Burden of proof. The factual findings of the CO will be affirmed, if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. **Haddad**, 96 INA 001 (Sep. 18, 1997). In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification. Because certification of alien workers is an exception to the general exclusion of immigrants, the Panel is required to construe its provisions strictly, and it must resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen,** 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896). Congress enacted § 212(A)(14) of the Immigration and Nationality Act of 1952 (as amended by § 212(a)(5)(a) of the Immigration Act of 1990 and recodified at 8 U.S. C. § 1182(a)(5)(A)) for the purpose of excluding aliens competing for jobs that United States workers could fill and to "protect the American labor market from an influx of both skilled and unskilled foreign labor." **Cheung v. District Director, INS**, 641 F2d 666, 669 (9th Cir., 1981); **Wang v. INS**, 602 F2d

211, 213 (9th Cir., 1979).[5] To effectuate the intent of Congress, regulations were promulgated to carry out the statutory preference favoring domestic workers whenever possible. Pursuant to the favored treatment Congress legislated for the limited class of alien workers whose skills were needed in the U. S. labor market, 20 CFR § 656.2(b) assigned the burden of proof in an application for alien labor certification under this exception to the general exclusion of aliens under the Act. This regulation quoted and relied on § 291 of the Act (8 U.S.C. § 1361), which provided:

> Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... .

Prevailing wage. The Secretary of Labor expressly provided the process to be followed by the U. S. Department of Labor in determining the prevailing wage for labor certification purposes by adopting 20 CFR § 656.40(a), which provides,

> (a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by §656.21(b)(3), shall be determined as follows:(1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. ...

The Employer appears to argue the Davis-Bacon Act does not apply because it only governs contracts with the U.S. government on government projects. The cases cited by the Employer noted in general terms that the Davis-Bacon Act was defined as giving local laborers and contractors a fair opportunity to take part in project when Federal funds are involved and to prevent contractors from bidding for contracts with wages lower than those prevailing in an area. Employer was mistaken in its belief that these authorities govern the implementation of § 212(s)(14 of the Immigration and Nationality act, as amended. It is established beyond argument in this proceeding that, if the position is in an occupation that is subject to a wage determination under the Davis-Bacon Act, the issue is not whether the employer is subject to the Davis-Bacon Act, but whether the occupation, itself, is subject to a wage determination under that act. **Standard Dry Wall**, 88 INA 099 (May 24, 1988)(*en banc*); see also **Brad Bartholomay, Jr.,**

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[5]The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

Landscape Design and Consultation, 88 INA 332, (May 31, 1989)(*en banc*).[6] As this job was subject to a wage determination under the Davis-Bacon Act in the area, the Employer's argument is without merit.[7]

Conclusion. The CO 's finding that the position at issue was subject to the provisions of 20 CFR § 656.40(a) was supported the evidence of record. Although the CO properly concluded that the prevailing wage for the job of Plumber in the place of intended employment was $31.31, per hour under the Davis-Bacon Act, the Employer refused to raise its wage offer to the amount required under the statutory guidelines of the Act. Consequently, the CO's denial of certification must be affirmed. **Anza Concrete**, 90 INA 329 (Oct. 18, 1991). Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

[6]See **Berk's Warehousing & Trucking**, 94 INA 579 (Jun. 13, 1996), as to the application of this subsection under the Service Contract Act.

[7]Moreover, Employer's request for certification was filed within the jurisdiction of a U. S. District Court in the State of California. Consequently, it is self-evident that the U. S. District Courts cited by the Employer's brief neither govern nor guide the interpretation of the Act and regulations in determining this application. Even if this case was within the jurisdiction of these courts, however, none of the cases cited referred to either the occupation of plumber or to proceedings under the Act and regulations before this Panel.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No.: 1999 INA 198
STONE CRAFT PROPERTY MANAGEMENT, INC., Employer,
CARLOS FLORES, Alien.

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis	10/5/99		
Huddleston	8/3/99		

Thank you,

Judge Neusner

Date: July 23, 1999